Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at http://about.jstor.org/participate-jstor/individuals/early-journal-content.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

CONTRIBUTION BETWEEN PERSONS JOINTLY CHARGED FOR NEGLIGENCE — MERRYWEATHER *v.* NIXAN.[1]

AS the commerce and business of the world broaden and the relations of persons engaged in industrial enterprises become more complicated, the question whether the courts will allow contribution between persons jointly chargeable as for *quasi delicts* or mere unintentional negligence is of ever increasing significance and importance.

The text-writers have not recognized the importance of the question, and have usually contented themselves with vague generalities, sometimes contradictory and often inaccurate. Whatever difficulties exist are due in part to the loose method in which many of the text-writers have treated the question, and are not due to any conflict in the decided cases themselves. The effort of this paper will be to present briefly examples of all the classes of cases on the subject, together with an analysis of the facts upon which each decision proceeded, the hope being thus to aid in clearing up a vitally important question left by the text-writers in great uncertainty.

The propositions of law under which all the cases will fall are believed to be two, and the discussion of them follows.

I.

As between conscious, wilful, malicious, or intentional joint wrongdoers, or tort-feasors who are in pari delicto, *neither the law nor equity will intervene to adjust the damage by enforcing contribution.*

Merryweather *v.* Nixan is usually styled the leading case on which the proposition rests. While this is true, yet the point there decided was clearly foreshadowed one hundred and seventy-five years earlier in Battersey's case.[2] With the foreknowledge and grasp of the law so often evinced by the early English judges, the court foresaw with clearness where the line should be drawn between cases in which recovery over would or would not be allowed,

[1] 8 Term Rep. 186, by King's Bench, in 1799.

[2] Winch's Rep. 48, by Common Pleas, in 1623.

and in a few words made evident their appreciation of the dividing line. It seems that Battersey, charged with rebellion from the Cinque Ports, was arrested and brought to the inn of the plaintiff by the defendant, with the request to the plaintiff to keep him a day and night, the defendant at the same time promising to indemnify plaintiff. Although the report does not so state in terms, yet it is inferentially quite evident that Battersey was kept by the plaintiff under duress; in other words, he was under arrest and physical restraint at the inn of the plaintiff. Battersey had sued the plaintiff for false arrest, and recovered. In an action upon the assumpsit of defendant to save plaintiff harmless it was held that the plaintiff should recover indemnity against the defendant, and Hobert, Chief Justice, and Hutton and Winch, answering the contention for the defendant that Battersey had been arrested and detained by the inn-keeper without cause, and that the promise to indemnify the inn-keeper was therefore void, said that, —

"Be the imprisonment lawful or not lawful, he might not take notice of that: as if I request another man to enter into another man's ground, and in my name to drive out the beasts, and impound them, and promise to save him harmless, this is a good assumpsit, and yet the act is tortious."

And by Hutton, J., it was further said that, —

"Where the act appears in itself to be unlawful, there it is otherwise, as if I request you to beat another, and promise to save you harmless, this assumpsit is not good, for the act appears in itself to be unlawful, but otherwise it is as in our case, when the act stands indifferent."

The case of Philips *v.* Biggs [1] was, it is true, cited in the argument of Merryweather *v.* Nixan, but an examination of the report discloses that the point was not decided.

It is singularly unfortunate, and has led to misunderstanding, that Merryweather *v.* Nixan should have been continually treated as stating the "general rule." As a matter of fact that case states not the rule, but the exception. The general rule is that among persons jointly liable the law implies an assumpsit either for indemnity or contribution, and the exception is that no assumpsit, either express or implied, will be enforced among wilful tort-feasors or wrongdoers.

---

[1] Hardres, 164 (1659).

The general rule has been recently thus stated: —

"Where two or more persons are jointly, or jointly and severally, bound to pay a sum of money, and one or more of them are compelled to pay the whole, or more than his or their share, those paying may recover from those not paying the aliquot proportion which they ought to pay." [1]

Green, J., in the early Virginia case of Thweatt *v.* Jones,[2] has succinctly stated the reason and the limitations of the decision in Merryweather *v.* Nixan as follows: —

"The reason why the law refuses its aid to enforce contribution amongst wrongdoers is, that they may be intimidated from committing the wrong, by the danger of each being made responsible for all the consequences; a reason which does not apply to torts or injuries arising from mistakes or accidents, or involuntary omissions in the discharge of official duties."

In considering the facts in Merryweather *v.* Nixan, and in applying that decision, it is important to bear in mind that the meaning of the word "tort" at the time of the decision in 1799 was limited and narrow. None of the early writers, such as Bacon, accurately defined torts, but the actions which they treat as torts are practically all actions such as batteries, slanders, etc., which were, of course, wilful or intentional wrongs. At that time the word "tort" had not come to be applied to the vast number of *quasi delicts* now known and classified as actions sounding in tort and arising out of mere negligence or unintentional injury. The classification of such actions as technical torts is of comparatively recent date. It is, therefore, vital to a correct understanding of the decision, that this limited meaning of the word "tort" — *i. e.*, a wilful or intentional wrong — be remembered. The vagueness of the term "tort," even at the present time, was commented upon by Lord Halsbury in a recent important authority on contribution, — Palmer *v.* Wick & Pulteneytown Steam Shipping Company.[3] Lord Halsbury there said: —

"The difficulty which has arisen is, I think, one of words. The word 'tort' in English law is not always used with strict logical precision. The same act may sometimes be treated as a breach of contract and sometimes as a tort. But 'tort' in its strictest meaning, as it seems to me

[1] 7 Am. & Eng. Enc. of Law (2d ed.), 326, title "Contribution and Exoneration."
[2] 1 Randolph, 328 (Va., 1823).
[3] L. R. (1894) H. L. (Sc.) A. C. 318.

ought to exclude the right of contribution which would imply a presumed contract to subscribe towards the commission of a wrong. It seems to me, therefore, that the distinction between classes of torts or *quasi delicts* and *delicts* proper is reasonable and just, though I doubt whether in dealing with an English case one would be at liberty to adopt such a distinction."

With the true meaning of "tort" in mind we turn then to the facts in Merryweather *v.* Nixan, where a judgment had been recovered against the plaintiff and defendant jointly in an action for injury to a reversionary interest in a mill and for trover for machinery. The whole damages were levied against the plaintiff, who thereupon sued his co-wrongdoer for contribution. The judgment of the court, pronounced by Lord Kenyon, was that there could be no contribution.

Although the decision has been sometimes condemned, yet the exception announced by the case had its rise in an enlightened view of the best public policy. The report of the facts in the case is somewhat meagre, but it is clear that the action proceeded on the theory of a malicious and wanton tort and trover. The fact that trover, with plea of not guilty, was the remedy chosen is of itself sufficiently significant and indicates a wilful joint wrong. Upon this theory of the case — and clearly no other theory will explain the subsequent decisions of the English courts commenting upon, following, or distinguishing Merryweather *v.* Nixan — the ethical objections to the decision entirely disappear. To one of two wrongdoers who had maliciously and without color of right injured the reversionary interest in, and had taken the machinery from, the mill, the court said in effect, "As a punishment for the wilful and malicious joint wrong which you have committed, and to intimidate you from again offending, the aid of the machinery of the courts of justice will be denied you when you seek to compel your co-wrongdoer to assume any part of the burden." Unquestionably it would be highly mischievous for the courts to step in and adjust among intentional wrongdoers the damage flowing from the wrong. By entertaining such suits the courts would aid intentional wrongdoers in avoiding the consequences of their acts. But limited to the case of intentional wrongdoers, the wisdom and rough and stern justice of the decision are apparent.

Defined within the limits laid down by subsequent English decisions, and intended, we think, by Lord Kenyon, the decision, so far from being objectionable even from an ethical point of view, is a

sound, salutary, and indeed necessary rule of law. Properly understood, it is confined to those cases wherein the joint wrong was confessedly intentional or immoral, or — as a crime or misdemeanor or those borderland offences, like slander — was of such a nature as to raise the presumption of wilfulness and malice.

The principal American cases wherein the rule of Merryweather *v.* Nixan has been applied are the following: —

In Peck *v.* Ellis,[1] contribution was denied in equity to one of two joint wrongdoers who had fraudulently and without right cut and carried off timber and logs.

In Arnold *v.* Clifford,[2] Judge Story held that neither contribution nor indemnity under an express contract would be enforced by the courts for the consequences of the joint publication of a libel.

In Miller *v.* Fenton,[3] contribution was denied among officers of a bank who had jointly and fraudulently abstracted the funds.

In Hunt *v.* Lane,[4] contribution between joint tort-feasors or wrongdoers was denied, and the rule of Merryweather *v.* Nixan applied, because the complaint seeking contribution did not show what the nature of the tort was, and the court, therefore, assumed that it was of such a class as would fall within the rule.

In Rhea *v.* White,[5] complainant sought and was properly denied contribution for the amount of a judgment which he had paid. The judgment was in an action of trover for the joint conversion of certain slaves, and the complainant did not allege in his bill, or prove, that the conversion was made under mistake or in ignorance of the want of title.

In Anderson *v.* Saylors,[6] contribution was denied, the judgment for which it was sought being in trover, but the nature of the act not appearing from the report of the case.

In Andrews *v.* Murray,[7] the opinion of the court stated that one trustee could not have contribution against another for their joint negligence which had resulted in loss; but the decision was rested upon the fact, found by the court to exist in the case, that the claim paid by plaintiff was not one for which all the trustees were liable. The remark of the court was, therefore, *obiter*.

In Spalding *v.* Oakes,[8] the parties had kept upon defendant's farm for their joint use a ram known to both of them to be vicious.

---

[1] 2 Johns. Ch. 131 (N. Y., 1816).
[2] 2 Sumner (U. S.), 238 (1835).
[3] 11 Paige, 18 (N. Y., 1844).
[4] 9 Ind. 248 (1857).
[5] 3 Head, 121 (Tenn., 1859).
[6] 3 Head, 551 (Tenn., 1859).
[7] 33 Barb. 354 (N. Y., 1861).
[8] 42 Vt. 343 (1869).

The ram was not restrained, as he should have been, and this fact was known to both parties. The ram escaped and did an injury to a woman, for which recovery was had and paid by plaintiff and defendant, the larger share having been borne by plaintiff. In this attitude of the case plaintiff sued defendant for indemnity or contribution; but this was denied, on the ground evidently that the failure to restrain an animal known to be vicious was a wilful and intentional wrong.

In Atkins *v.* Johnson,[1] a journalist (the plaintiff) had published a libellous article upon the faith of a contract with the writer (defendant) to indemnify him. There was a recovery against the journalist for the libel, whereupon he sought to recover over indemnity upon his contract or contribution, but the court denied the right to either; Pierpont, C. J., saying: —

"In this case, these parties in the outset conspired to do a wrong to one of their neighbors, by publishing a libel upon his character. The publication of a libel is an illegal act upon its face. This, both parties are presumed to have known."

In Wehle *v.* Haviland,[2] contribution was denied as between persons who had made a wrongful joint levy of an attachment against certain goods. This case is in conflict with the weight of respectable authority, and is unsound. But it proceeds on the theory that the levy was an intentional wrong, and even if sound, the case upon its facts is not authority for the denial of contribution among persons jointly liable for mere unintentional negligence.

In Boyd *v.* Gill,[3] Wallace, J., said that there could be no contribution between trustees who had fraudulently misappropriated the trust funds.

In Davis *v.* Gilhaus,[4] plaintiff and defendant had been in business as partners. Defendant was also county treasurer. He used the county funds in the business with the knowledge of plaintiff. Upon dissolution plaintiff was compelled to reimburse the county in full, whereupon he sought contribution, which was denied, on the ground that the facts constituted a joint embezzlement of the public money; and Johnson, J., said, "That each of these partners were equally guilty in the eye of the law for embezzling the public money is clear."

---

[1] 43 Vt. 78 (1870).
[2] 42 How. Pr. 399 (N. Y. 1872).
[3] 19 Fed. 145 (1883).
[4] 44 Ohio St. 69 (1886).

In Boyer *v.* Bolender,[1] one of several directors of an insurance company paid off a judgment recovered against the directors jointly for the fraudulent appropriation of the company's money to their own use. Contribution was denied him against his co-directors.

It will be seen that in every American case where the rule of Merryweather *v.* Nixan has been applied the facts show either an intentional tort or an act, as the basis of joint liability, which is *malum in se* or immoral. No case has been found applying the rule to a joint tort or *quasi delict* not intentional and not immoral.

II.

Even though parties are in pari delicto, *contribution will be allowed for joint quasi delicts where the wrong or tort was not wilful, malicious, intentional, unlawful, or immoral.*

As the scope of this paper is limited to the discussion of the rules governing contribution, those cases wherein indemnity has been recovered or denied will not be discussed; but as they involve collateral and equally important questions, reference to some of the more instructive of them will be found in the foot-note.[2]

As an instance of the confusion of mind which the text-writers have shown in dealing with this branch of the subjects of contribution, we may refer to Webb's Pollock on Torts, page 233, wherein no less an authority than Sir Frederick Pollock stated the rule to be that "a wilful or negligent wrongdoer has no claim to contribution or indemnity;" but after the word "negligent" he added an original note, "I am not sure that authority covers this," and thus left the subject speculative, as he cited no case in support of his proposition, so far as that proposition related to mere negligence.

In Clerk & Lindsell's Torts[3] an admirable discussion will be

---

[1] 129 Pa. 324 (1889).

[2] Adamson *v.* Jarvis, 4 Bing. 66 (1827); Betts *v.* Gibbins, 2 Ad. & El. 57 (1834); Lowell *v.* Boston & Lowell R. R. Co., 40 Pick. 24 (Mass., 1839); Gower *v.* Emery, 18 Me. 79 (1841); Jacobs *v.* Pollard, 10 Cush. 287 (Mass., 1852); Moore *v.* Appleton, 26 Ala. 633 (1855); Chicago *v.* Robbins, 2 Black, 418 (1862); Chicago *v.* Robbins, 4 Wall. 657 (1866); Gray *v.* Boston Gaslight Co., 114 Mass. 149 (1873); Churchill *v.* Holt, 127 Mass. 165 (1879), and the same case again reported in 131 Mass. 67 (1881); Old Colony R. R. Co. *v.* Slavens (Mass., 1889), 38 Am. & Eng. R. Cas. 382; Rochester *v.* Campbell, 123 N. Y. 405 (1890); Gulf, C. & S. F. Ry. Co. *v.* Galveston, H. & S. A. Ry. Co., 83 Tex. 509 (1892); O. S. Nav. Co. *v.* Compania T. Espaniola, 134 N. Y. 461 (1892); Cincinnati, etc. R. Co. *v.* L. & N. R. Co., 97 Ky. 128 (1795); The Englishman and The Australia (1894), P. 239 (1895), P. 212; District of Columbia *v.* Washington Gaslight Co., 161 U. S 316 (1896); and Wilhelm *v.* Defiance, 50 N. E. Rep. 18 (Ohio, 1898).

[3] 2d ed., 1896, note *b*, p. 66.

found of the limitations of Merryweather *v.* Nixan, and it is there said:—

"It is sometimes loosely said that there is no contribution between joint tort-feasors, that is to say, that if, on an action being brought for a joint tort, one wrongdoer pays the whole damages recovered, he cannot, whatever the nature of the tort, recover a proportion of the damages from the others. For this wide proposition there is apparently no authority except the head-note to the report of Merryweather *v.* Nixan in the Term Reports (8 T. R. 186), which head-note does not seem to be borne out by the judgment."

Perhaps of all the earlier text-books Broom's Legal Maxims[1] shows the broadest and soundest conception of Merryweather *v.* Nixan. In that work the rule is stated as follows: —

"To the above maxim respecting *par delictum* may also be referred the general rule that an action for contribution cannot be maintained by one of several joint wrongdoers against another, although the one who claims contribution may have been compelled to pay the entire damages recovered as compensation for the tortious act. It is, however, expressly laid down that this rule does not extend to cases of indemnity, where one man employs another to do acts not unlawful in themselves for the purpose of asserting a right; and it is also clear, from reason, justice, and sound policy, that this doctrine applies only where the person seeking redress must be presumed to have known that he was doing an unlawful act."

In Lingard *v.* Bromley,[2] the Master of the Rolls held that contribution would be enforced among assignees in bankruptcy to reimburse a payment by one under an order for a loss occasioned by their joint act. It was said that the loss had been occasioned by "the non-performance of a civil obligation," thus indicating the distinction afterward drawn in the English cases between merely civil neglect, or negligence, and the intentional class of tort for which contribution will not be allowed.

In Thweatt *v.* Jones,[3] the complainant filed a bill in chancery asking contribution. Complainant was the administrator of an inspector of tobacco, while the defendant was the administrator of another inspector of tobacco. There had been previously a judgment against the complainant for failure of his intestate to deliver tobacco when legally demanded, which judgment complainant's in-

[1] Pages 328, 329.

[2] 1 Ves. & B. 114 (1812).

[3] 1 Randolph, 328 (Va., 1823).

testate had discharged. It appeared that Thweatt and Hinton, who were co-inspectors of tobacco, had by a mere mistake or negligence delivered the receipts therefor, and the tobacco itself, to some person other than the owner. Held, that the rule denying contribution among joint tort-feasors does not apply to torts or injuries arising from mistakes or accidents, or involuntary omissions in the discharge of official duties.

Merryweather *v.* Nixan was cited and relied upon to defeat contribution, but Green, J., denied its application to the facts before the court, and said: —

"Contribution is not due by reason of any contract, express or implied. But when any burthen ought, from the relation of the parties, or in respect of property held by them, to be equally borne, and each party is *in aequali jure*, contribution is due, unless the claim to contribution has arisen out of some *actual fraud*, or *voluntary wrong*, in which the party claiming contribution has participated. The mere non-performance or violation of a civil obligation is not such a wrong as will condemn a claim to contribution. The act which precludes a party from the right to claim contribution from those who were equally liable to the burthen as himself, must be *malum in se*, as actual fraud or voluntary wrong."

And again he said: —

"Courts of law enforce contribution only in cases where a contract between the parties to that effect may be presumed; but courts of equity indulge in a larger jurisdiction, and admit contribution whenever the parties were originally subject, jointly, to the burthen, and are *in aequali jure*, and where the party claiming the assistance of the court is not precluded, by his own turpitude, from receiving it. In the case at bar, the only default of the inspectors appears to have been the non-delivery of the tobacco to the owners of it. This might happen in various ways, without imputing fraud or voluntary wrong to the inspectors. It might have been delivered, as is stated in the evidence given in one of the suits at law (which is, however, no evidence against the defendants in this suit), in consequence of the notes or receipts having been delivered to a person producing a forged order. It might have been delivered to an improper person by mere mistake, or stolen; and, in the absence of all proof, although it might have been embezzled by the inspectors, such embezzlement ought not to be presumed. Fraud is odious, and ought to be proved. Nor do I think that this conclusion ought to be affected by the statement in the bill that the judgments were recovered for a joint *malversation* in office. That is a loose expression, corrected by the context of the bill, and by the records of those judgments, which exhibit

nothing inconsistent with the supposition that the tobacco was lost to the owners by a fraud practiced upon the inspectors or by their mistake."

"The case seems to me to resolve itself into these propositions. When parties are equally bound to bear a burthen, and are *in aequali jure*, that is, liable from the same circumstances existing as to both, contribution is due of right, in equity; that this general proposition is liable to one exception, namely, that the party who would otherwise be entitled to such contribution, forfeits such right if the joint liability arose from an act *malum in se*, a fraud or voluntary tort, in which he participated; that when it is shown that the parties were originally equally bound, and stood *in aequali jure*, the party who has paid all, is entitled of course to contribution, unless it be shown on the other side that his right has been forfeited as aforesaid, by his own wrongful act. No such fact is alleged or proved in this case."[1]

In Wooley *v.* Batte,[2] one of two partners owning a stage-coach sustained a recovery by a passenger who was injured by the negligence of the coachman. Upon suit against his partner for contribution the court held him entitled to recover, and refused to apply Merryweather *v.* Nixan.

In Pearson *v.* Skelton,[3] the parties were jointly interested in a stage-coach. By the negligence of the driver a person was injured, and a recovery had against the plaintiff, who thereupon sued the defendant for contribution. One defence attempted to be interposed was that contribution could not be had because the liability grew out of a tort, but the court held that this ground was not tenable.

In Horbach *v.* Elder,[4] several persons were engaged as co-partners in operating a stage line. By the negligence of a driver a passenger was injured, and he sued and recovered from one of the co-partners, who thereupon sued the others, and was held entitled to recover contribution from them.

---

[1] Five judges were upon the bench at the time this case was decided, and four delivered opinions, two being in favor of and two against contribution. The reporter states that Fleming, P., the fifth judge, was absent during the period of the cases in 1 Randolph, and as the lower court had refused contribution the result would seem to have been a denial of the right by divided court, but the reporter also states in his syllabus that contribution was allowed. Possibly the explanation of this apparent anomaly is that Fleming, P., did actually join in the decision of this particular case, and held with Green, J., that contribution should be allowed. Or, as is more likely, at least three of the judges agreed upon the syllabus, although Judge Brooke thought the case one of "malversation" or wilful wrong, and, therefore, not a case for contribution.

[2] 2 C. & P. 417 (1826).

[3] 1 M. & W. 504 (1836).

[4] 18 Pa. 33 (1851).

In Acheson *v.* Miller,[1] contribution was sought for a wrongful joint levy upon certain goods. The parties who directed the levy believed it to be lawful. The court held that they were wrong-doers, and applied Merryweather *v.* Nixan, denying contribution.

Thus the case was reversed and sent back for re-trial.

But when it came before the Supreme Court of Ohio a second time (2 Ohio State, 203; 1853) the unsoundness of the former decision was recognized, the decision in terms overruled and contribution allowed, Caldwell, J., saying: —

"The rule that no contribution lies between trespassers, we apprehend, is one not of universal application. We suppose it only applies to cases where the persons have engaged together in doing wantonly or knowingly a wrong. The case may happen that persons may join in performing an act which to them appears to be right and lawful, but which may turn out to be an injury to the rights of some third party, who may have a right to an action of tort against them. In such case, if one of the parties who have done the act has been compelled to pay the amount of the damage, is it not reasonable that those who were engaged with him in doing the injury should pay their proportion? The common understanding and justice of humanity would say that it would be just and right that each of the parties to the transaction should pay his proportion of the damage done by their joint act; and we see no reason why the moral sense of a court shall be shocked by such a result."

In Bailey *v.* Bussing,[2] the owner of a coach, after being charged for the negligence of the driver, sued him for contribution, and it was held he could recover.

Ellsworth, J., said: —

"The reason assigned in the books for denying contribution among trespassers is that no right of action can be based on a violation of law; that is, where the act is known to be such, or is apparently of that character. A guilty trespasser, it is said, cannot be allowed to appeal to the law for an indemnity, for he has placed himself without its pale by contemning it, and must ask in vain for its interposition in his behalf. If, however, he was innocent of an illegal purpose, ignorant of the nature of the act, which was apparently correct and proper, the rule will change with its reason, and he may then have an indemnity, or, as the case may be, a contribution, — as a servant yielding obedience to the command of his master, or an agent to his principal, in what appears to be right; an assistant rendering aid to a sheriff in the execution of process; or com-

[1] 18 Ohio, 1 (1849).

[2] 28 Conn. 455 (1859).

mon carriers, to whom is committed, and who innocently carry away, property which has been stolen from the owner. . . . The form of action, then, is not the criterion. We must look further. We must look for personal participation, personal culpability, personal knowledge. If we do not find these circumstances, but perceive only a liability in the eye of the law, growing out of a mere relation to the perpetrator of the wrong, the maxim of law that there is no contribution among wrongdoers is not to be applied. Indeed, we think this maxim too much broken in upon at this day to be called with propriety a rule of law, so many are the exceptions to it, as in the cases of master and servant, principal and agent, partners, joint operators, carriers, and the like."

In Selz *v.* Unna,[1] parties to a joint wrongful levy upon the goods of Unna had contributed to the payment of a judgment against them, and then sought, under a fraudulent agreement made in the course of one branch of the litigation, to place the whole loss upon Unna, instead of his proportion, which he had already paid. The court declined to disturb the contribution made by the parties themselves, and Mr. Justice Clifford said: —

"Equal contribution to discharge a joint liability is not inequitable, even as between wrongdoers, although the law will not, in general, support an action to enforce it where the payments have been unequal. (Merryweather *v.* Nixan, 8 T. R. 186; Bailey *v.* Bussing, 28 Conn. 455.) Where the liability is joint, equal contribution is just, and it would afford the complainants no ground of relief if it appeared that the arrangement with the marshal was such as is alleged in the bill of complaint. Having collected three-fourths of the amount of the other defendants, it was quite right that he should, if possible, levy the balance so as to effect equal justice between the parties."

In Armstrong County *v.* Clarion County,[2] a traveller while passing over a bridge between the two counties, plaintiff and defendant, was injured by the breaking down of the bridge due to negligence in its maintenance. The duty of maintaining the bridge rested upon both counties. The traveller sued and recovered (including costs, $1,597.31) from Armstrong County alone for negligence. Armstrong County paid the judgment, and then brought assumpsit against Clarion County for contribution of its proportion, or one-half the judgment, costs, etc.

Read, J., said (pages 219, 220): —

"There can be little doubt that morally Clarion County was bound to pay one-half of the sum recovered from and paid by Armstrong County;

[1] 6 Wall. 327 (1867).

[2] 66 Pa. 218 (1870).

and the question is, does not the law make the moral obligation a legal one?"

After commenting upon Merryweather *v.* Nixan, and other cases, Judge Read answered his query as follows (pages 221, 222): —

"The parties, plaintiff and defendant, are two municipal corporations, jointly bound to keep this bridge in repair. These bodies can act only by their legally constituted agents, their commissioners, who examine the structure and order repair which is done. They erred in judgment, and both were liable for the consequences of that error, and one having paid the whole of the damages is entitled to contribution from the other."

In Power *v.* Hoey,[1] directors of a railway company had irregularly and improperly accepted promissory notes of one of their number in payment for his shares, and had reported the shares to the company as full paid. Held, that the transaction was not so fraudulent or illegal as to entitle the representative of the debtor to repudiate the debt, and the directors having voluntarily made good to the company the full price of the shares, were held entitled to be indemnified out of the assets of the debtor.

In Nickerson *v.* Wheeler,[2] the property of the president of a manufacturing corporation was taken in satisfaction of a decree against him and the other officers, holding them personally liable to a creditor for neglect to file the annual certificates required by law. Held, that the president might have contribution from the other officers, and Devens, J., said: —

"It is contended that, as the liability of the plaintiff and defendants to the creditors of the corporation, of which they were officers, arose from their neglect of duty as such officers to file the annual certificate required by the St. of 1862, c. 210, the principle upon which at common law it has been decided that one wrongdoer who has paid the damages recovered on account of the wrongful act of both is not entitled to contribution from the other, applies here, and therefore that the plaintiff cannot maintain this suit. Merryweather *v.* Nixan, 8 T. R. 186. But although one may have been made liable in tort, he is not necessarily deprived of contribution from another also originally liable, where the foundation of the action is simply negligence on the part of each in carrying on some lawful transaction. Thus, where one of two coach proprietors had been made liable in tort to a party who was injured by the negligence of a servant employed by himself and another, he was entitled to contribution

[1] 19 W. R. 916 (1871). [2] 118 Mass. 295 (1875).

from his co-proprietor. Wooley *v.* Batte, 2 C. & P. 417. Both were engaged together in lawful business, and the negligence of which they were guilty, in employing a servant from whose misconduct injury resulted, did not place them in such position that they were treated as wrongdoers, whose action against each other could only be founded in their community of wrong. The cases of Oakes *v.* Spaulding, 40 Vt. 347, and Spalding *v.* Oakes, 42 Vt. 343, relied on by the defendants, do not conflict with this. The parties to the transaction there were engaged in what was a wrongful act as against any one injured thereby, namely, keeping a vicious animal, and the neglect to take care of it, by reason of which it did injury, was not an act of nonfeasance merely; the whole act of keeping it was one of misfeasance."

In Ashhurst *v.* Mason,[1] shares of a company were purchased and transferred (*ultra vires*) to the name of a director in trust for the company. He then paid calls upon the shares, and the Vice-Chancellor (Sir James Bacon) held him entitled to contribution from the other directors who concurred in the transaction.

In Herr *v.* Barber,[2] Mr. Justice Hagner said (p. 556): —

"The principle that there can be no contribution, at law, enforced by one tort-feasor against the other wrongdoers, is limited by the more modern authorities to cases where the transaction, out of which the judgment arises, involves moral turpitude."

Although he properly declined in the case before him to allow contribution, because upon the facts there was a breach of trust having the elements of a deliberate, intentional wrong.

In Ankeny *v.* Moffett,[3] it was held (irrespective of a statute there involved) that the rule that there can be no contribution among wrongdoers applies only where the person seeking the contribution must be presumed to have known that he was doing an illegal act. Accordingly, in that case, the court allowed contribution between two persons through whose negligence, or through that of their agents, a building in course of construction upon their property fell and injured a man.

In Smith *v.* Ayrault,[4] there had been a recovery against Smith for infringement of a patent upon steam-pipe casing. Smith and Ayrault were partners, and the infringement had been committed

[1] L. R. 20 Eq. 225 (1875).
[2] 2 Mackey, 545 (Supreme Court, District of Columbia, 1883).
[3] 37 Minn. 109 (1887); s. c. 33 N. W. 320.
[4] 71 Mich. 475 (1888).

by and in the name of the firm, although Smith was alone sued and paid the entire judgment. Upon an assumpsit by Smith against Ayrault for contribution, the plaintiff recovered.

In Van Diver *v.* Pollak,[1] contribution was allowed between joint trespassers where their trespass consisted of levies made by their joint procurement under their several attachments, and was made in good faith, believing that the claim of the assignee to the property was actually fraudulent.

To the same general effect see Farwell *v.* Becker.[2]

In Gulf, Colorado, & Santa Fé Ry. Co. *v.* Galveston, Harrisburg, & San Antonio Ry. Co.,[3] the three companies had a yard used indiscriminately by all three, but belonging exclusively to the Gulf Company. A joint employee of the three companies in the yard was injured while coupling cars on an unballasted track, and sued jointly the Gulf Company and the Galveston Company, recovering a judgment which was paid half by the Gulf Company and half by the Galveston Company. The injury was found by the court to have been caused by the negligence of the Gulf Company and the Galveston Company. The court further found that the New York Company had not been guilty of any negligence.

Upon these facts the Gulf Company sued the Galveston Company for indemnity, and the New York Company for contribution, and the court held:—

First, That as the Gulf Company had furnished an unballasted and unsafe track, it was guilty of the primary negligence, and cannot have indemnity against the Galveston Company.

Second, That as the New York Company was found free from fault, it cannot be compelled to contribute.

And Hobby, P. J., laid down the correct general rule as to contribution as follows:—

"The rule is far from being universally true that there can be no contribution between wrongdoers. It prevails in that class of cases denominated as intentional torts or wrongs."

In Palmer *v.* Wick & Pulteneytown Steam Shipping Company,[4] the appellant, a stevedore, was engaged in discharging iron from the respondent's ship, when one of his workmen was killed by the fall of a block, part of the ship's tackle. The tackle was de-

---

[1] 97 Ala. 467; s. c. 19 L. R. A. 628 (1893).
[2] 21 N. E. 792 (Ill., 1889).
[3] 83 Tex. 509 (1892).
[4] L. R. (1894), H. L. (Sc.) A. C. 318.

fective and was negligently used by the stevedore. The family of the workman sued the company and the stevedore jointly, and recovered a judgment which was paid in full by the company. The case as it came to the House of Lords was an action by the company against the stevedore to recover the moiety or one-half of the judgment. Held, affirming the Inner House, that the stevedore was liable.

Lord Herschell, L. C., said: —

"It is not necessary in this appeal to decide whether there can be any right to contribution in the case of a delict proper when the liability has arisen from a conscious and therefore moral wrong, nor even whether in every case of *quasi-delict* a delinquent may obtain relief against his co-delinquent, though I see, as at present advised, no reason to differ from the opinion which I gather my noble and learned friend Lord Watson holds, that such a right may exist. In circumstances such as those with which your Lordships have to deal, I cannot but think that equity and justice are in favor of the conclusion arrived at by the Inner House, and there seems to be no authority compelling a contrary decision. It was urged that the person seeking relief might be the more culpable of the delinquents; but it is just as likely that he should be the less culpable. In selecting from which of his co-debtors he will obtain payment, the creditor would be guided usually by considerations wholly independent of the relative culpability of those from whom he may recover it.

"Much reliance was placed by the learned counsel for the appellant upon the judgment in the English case of Merryweather *v.* Nixan, 8 T. R. 186. The reasons to be found in Lord Kenyon's judgment, so far as reported, are somewhat meagre, and the statement of the facts of the case is not less so. It is now too late to question that decision in this country; but when I am asked to hold it to be part of the law of Scotland, I am bound to say that it does not appear to me to be founded on any principle of justice or equity, or even of public policy, which justifies its extension to the jurisprudence of other countries. There has certainly been a tendency to limit its application even in England. In the case of Adamson *v.* Jarvis, 4 Bing. 66, Best, C. J., in delivering the judgment of the court, referred to the case of Phillips *v.* Biggs, Hard. 164, which he said was never decided; 'but the Court of Chancery seemed to consider the case of two sheriffs of Middlesex, where one had paid the damages in an action for an escape, and sued the other for contribution, as like the case of two joint obligors.' He then proceeded as follows: 'From the inclination of the court in this last case, and from the concluding part of Lord Kenyon's judgment in Merryweather *v.* Nixan, 8 T. R. 186, and from reason, justice, and sound policy, the rule that wrongdoers cannot have redress or contribution against each other is confined to cases where the person seeking

redress must be presumed to have known that he was doing an unlawful act.' If the view thus expressed by the Court of Common Pleas be correct (and I see no reason to dissent from it), the doctrine that one tort-feasor cannot recover from another is inapplicable to a case like that now under consideration."

Lord Watson said: —

"From these authorities, which are to some extent conflicting, and in other respects are not so definite as one could wish, I think the following conclusions may be derived. They are at variance in so far as they directly relate to the existence or non-existence of a right of relief among those persons who have incurred civil liability by acting together in the perpetration of an offence against the criminal law. But it does not appear to me that the *dicta* of those writers who negative the existence of such a right can be held to contemplate every case of *quasi-delict*, whatever be its nature. They *primâ facie* refer to proper delicts, and might *ex paritate rationis* be extended to every *quasi-delict* which, according to the phraseology of Scotch law, *sapit naturum delicti*, but they cannot, in my opinion, be fairly read as referring to *quasi-delicts* which involve no moral offence on the part of the delinquent."

The rule on this point must inevitably be laid down by the courts, as announced in the Scotch case of Palmer *v.* Wick & Pulteneytown Steam Shipping Company, and the Pennsylvania case of Armstrong County *v.* Clarion County, and the other cases *supra*. Not only do good morals require this rule, but it is vitally necessary to the conduct of business under modern conditions. And, furthermore, the reason for the decision in Merryweather *v.* Nixan does not exist in the case of a merely negligent tort, not in itself unlawful or intentional.

To illustrate the unwisdom of any rule but the one contended for, we may instance the bond given to a sheriff before he makes a levy. If the levy turns out to be wrongful, the sheriff is properly held a wrongdoer as to the person aggrieved, but if to his act and to the bond indemnifying him Merryweather *v.* Nixan were to be applied, and if under that case his act were to be treated as intentional wrong, then the bond would be quite as ineffective to protect him as the implied assumpsit for indemnity.

The courts, however, invariably uphold the right of a sheriff to require such bonds,[1] and thus show that Merryweather *v.* Nixan

[1] Bond *v.* Ward, 7 Mass. 123 (1810); Spangler *v.* Commonwealth, 16 S. & R. 68 (1827); Chamberlain *v.* Beller, 18 N. Y. 115 (1858); Smith *v.* Cicotte, 11 Mich. 383 (1863); Commonwealth *v.* Vandyke, 57 Pa. 34 (1868); Long *v.* Neville, 36 Cal. 455 (1868); Grace *v.* Mitchell, 31 Wis. 533 (1872).

does not apply. In fact, Lord Kenyon in Merryweather *v.* Nixan clearly intimated that such a bond would be upheld.

But if the purpose of such a promise of indemnity were treated as illegal, — if the tort in such a case were held an intentional wrong, — the courts will not enforce the contract.[1]

All such contracts of indemnity against the possible consequences of negligent torts will be void and not enforceable in the courts if Merryweather *v.* Nixan were improperly extended to any wrong except intentional or malicious wrong, or crime or misdemeanor.

Any other rule than that stated in proposition II. would result in the railroad companies, factory owners, owners of buildings having elevators, and other persons who have insured against loss by negligence of their employees, finding the doors of the courts closed to them when they bring assumpsit upon their policies to recover over the amounts of judgments against them for torts.[2]

Proposition II. rests upon both reason and authority, and no single case, it is believed, has been decided against it when the facts are analyzed. To lay down any rule other than that em-

---

[1] Colburn *v.* Patmore, 1 C. M. & R. 73; s. c. 4 Tyrw. 677 (1834); Arnold *v.* Clifford, 2 Sumn. (U. S.) 238 (1835); Shackell *v.* Rosier, 2 Bing. N. Cas. 634; s. c. 29 E. C. L. 438 (1836); Atkins *v.* Johnson, 43 Vt. 78 (1870).

[2] The recent decision in the Admiralty Division of the High Court of Justice in The Englishman and the Australia (1895, P. 212) is a case of interest in considering the validity of contracts insuring against the consequences of negligence. The case has been considered unsound by the writers of the most extensive treatise recently published in England on Torts, — Clerk & Lindsell, Torts (2d ed. 1896), 56, note *b*, — wherein the case is stated not to be distinguishable from the decision of the Lords in Palmer *v.* Wick & Pulteneytown Steam Shipping Company, L. R. (1894), H. L. (Sc.) A. C. 318.

Bruce, J. (1895, P. 217), said in The Englishman and the Australia: "It was never decided in Merryweather *v.* Nixan that one wrongdoer could not sue another for contribution, but that an implied promise to indemnify did not arise from the mere fact of payment of the whole of the joint liability by one of several wrongdoers."

The decision does not deny the validity of an express contract either for contribution or indemnity in a case of joint negligence, but places the judgment on the ground that in the admiralty and upon the particular facts appearing in that case the law would not imply a contract for indemnity or contribution. It is difficult to understand how the court reached the conclusion that an express contract would be upheld while the law would not imply one, but in any event the case, if deemed in conflict with Palmer *v.* Wick, where the right to contribution for joint negligence was distinctly recognized by the House of Lords, cannot be regarded as an authority against contribution in such a case. The principal importance of the decision of Bruce, J., lies, it is believed, in the distinct statement contained in his opinion to the effect that express contracts — such as the insurance contracts mentioned in the body of this paper — will be upheld by the courts.

bodied in II. would be against good conscience, and would be a blind, hidebound application of the principle of Merryweather *v.* Nixan to a state of facts in which the reason for that decision has no existence.

Not only are both of the propositions believed to be sustained by the decided cases, but when the subject is broadly considered and thoroughly understood, the courts, influenced alike by the authorities and by the ethical principles involved, surely must announce the law as stated.

Theodore W. Reath.

PHILADELPHIA, August 12, 1898.